In the

Supreme Court of the United States.

October Term, 1899. No. 72.

THE AMERICAN EXPRESS COMPANY,

Plaintiff in Error,

vs.

FRED. A. MAYNARD, Attorney-General of the State of Michigan, on relation of GEORGE F. MOORE et al.,

Defendant in Error.

Brief on Behalf of Plaintiff in Error in Opposition to Motion to Dismiss Writ of Error.

LEWIS CASS LEDYARD,

Of Counsel for Plaintiff in Error.

C. G. Hoagland, Printer and Bookbinder, N. Y.

In the Supreme Court of the United States

THE AMERICAN EXPRESS COMPANY,
Plaintiff in Error,

AGAINST

FRED A. MAYNARD, Attorney-General of the State of Michigan, on relation of GEORGE F. MOORE ET AL,
Defendant in Error.

Brief in Behalf of Plaintiff in Error in in Opposition to Motion to Dismiss Writ of Error.

The defendant in error, in his petition in the State Court, alleges (Transcript of Record, p. 6) the passage by Congress of the act of June 13th, 1898, known as the War Revenue Act, and sets up certain of the provisions of that act, and further alleges (p. 7): "That, by reason of a desire of the respondent to avoid the payment of the stamp tax so called, and to impose such obligation upon the shipper the respondent herein refuses to accept any goods for transportation, unless such shipper attaches the stamp to the said bill of lading, manifest or other evidence of receipt and forwarding for each shipment, or furnishes the money and means for that purpose to the said company, and that the said company thereby not only avoids its duty

under said Act of Congress to pay and bear its proportion of the revenues to meet war expenditures, as provided by said act, but violates its duty as a common carrier to receive, accept, transport and deliver such goods, wares and merchandise so offered and tendered to it for that purpose.

The prayer of the petition is (p. 10):

"Your petitioner therefore prays that a peremptory mandamus may issue to the said The American Express Company and Charles F. Reed, the local agent thereof, respondents, and to its officers, agents and servants, commanding it and them to receive, accept, transmit and deliver any and all goods, wares and merchandise duly offered or tendered to it in boxes, bales, packages or bundles, or not so enclosed or included for transportation, when the fees and charges for such goods are paid, offered or tendered to said company, and to issue to the shippers or consignors throughout the State of Michigan, or their agent or agents, or persons from whom any such goods are received for transportation, a bill of lading, manifest or other evidence of receipt and forwarding for each shipment received for carriage and transportation, with the stamp duly attached thereto and canceled by it, as provided by the Act of Congress hereinbefore mentioned, and without demanding or requiring of such consignors or shippers the said stamp, or the value thereof."

The plaintiff in error in its answer in the State Court alleges "that under the terms of said Act of Congress, properly construed, it is not made respondent's duty to pay said tax" (p. 19).

"That in the act, Congress seems carefully to have refrained from providing, as between shipper and carriers, which shall bear the burden of the tax, thereby evidently intending to leave it a matter of adjustment by the parties" (p. 21).

* * * * * *

"That the enactment of the Stamp Act referred to, being an important change in the then condition of things, it became necessary for respondent to change and regulate its method of transacting its business, and to re-establish its rates of transportation, so that it might meet that change in a way to prevent its resources from being so depleted as to weaken its financial condition.

"Respondent, therefore, decided to raise, and did raise, its rates of transportation, to an amount reasonsonable and just and only necessary to meet the change of conditions made by said act, and save itself from great loss of revenue and profits as compared with its earnings before the passage of said act.

"And respondent submits and asserts that it had the full and perfect right to make such change in its method of transacting its business and in its former rates of transportation" (p. 22).

The plaintiff in error further alleges in its answer that the facts stated in the petition do not constitute a case within the jurisdiction of the Court (fol. 21).

The suit was submitted to the State Court on petition and answer, and it was ordered that a writ of mandamus issue in accordance with the prayer of the petition.

The Supreme Court holds in its opinion that the main question in the case relates to the construction to be placed on the War Revenue Act; that by that act the carrier is required to provide the stamp for the bill of lading, manifest or other evidence of receipt, and he is by implication forbidden to cast the burden of the tax upon the shipper by raising his rates for that purpose (pp. 37 *et seq.*).

The reasonableness of the rates charged by the plaintiffs in error, apart from the question of the tax, is not called in question either by the petitioner or the Court.

The Court states in its opinion: "It is contended by counsel for the respondent that the question is one

over which the Federal Courts have exclusive jurisdiction." This contention is overruled by the Court.

ARGUMENT.

I. The decision of the State Court sought to be reviewed turned upon the construction of a statute of the United States, and the decision of the State Court was against a right, title, privilege or immunity claimed thereunder by plaintiff in error.

What questions were raised and decided in the State Court is to be determined by an examination of the whole record and of the record the opinion of the State Court forms a part.

Rule 8, Subdivision 2, Sayward vs. Denny, 158 U. S., 183.

The plaintiff in error specially set up and claimed in the State Court the right under the Act of June 13th, 1898, known as the War Revenue Act, to refuse to accept goods for transportation, unless the person offering the goods provides the stamp for the bill of lading, manifest or other evidence of receipt required to be issued to each shipper of goods accepted for transportation.

The defendant in error in his petition in the State Court alleged that the plaintiff in error by refusing to accept goods for transportation as above, violates its duty under the War Revenue Act, and its duty as a common carrier. To these allegations the plaintiff in error in effect answered that, by the statute they are permitted to exempt themselves from the burden of the tax in the manner adopted by them, and that the express company in requiring the shippers to pay the tax represented by the stamp did not raise its rates to an amount more than was reasonable and just and necessary under the new conditions brought about by the War Revenue Act.

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As the suit was heard upon petition and answer, the State Court must have assumed the second of these allegations—in so far as it was an allegation of fact—to be true. The only way, therefore, in which the Court could have reached the conclusion reached by it was by holding as a matter of law that the amount of the tax could not be considered as an item of expense attending the transportation of goods to be taken into account in fixing reasonable rates.

The opinion of the Court shows that its conclusion was in fact reached by this mode of reasoning:

The Court says: "The Act makes it the duty of the Company to affix the stamp.

"It is contended, however, that the Company has the right to make new regulations and establish new rates to meet this burden. It is conceded that the effect of this is to throw the burden upon the shipper.

"It is apparent upon the face of the proceeding that the very purpose of this change in the regulations and the increase of rates is to avoid the payment of the tax and thus cast upon the shippers the burden which the act of Congress puts upon the Company. This is but an evasion and a subterfuge to avoid the terms of the act. The pretence that by raising the charges on each package just one cent, without reference to the distance to be carried, the weight or bulk of the package, and the former fixed charges, is a regulation of charges, can hardly be treated seriously."

It must be concluded that the decision of the State Court was based wholly upon its construction of the Federal statute and the rights and duties created thereby and not on any independent ground of the common-law obligations of the plaintiff in error as a common carrier.

The plaintiff in error in support of the right claimed by it under the statute alleged that by the true construction thereof the tax represented by the stamp is imposed upon the transaction of shipment, it being left to be determined by the contract between

the parties thereto which shall bear the burden of the tax, and that consequently the right is reserved to the carrier to treat the amount of the tax as an addition to the expenses attending the performance of the service justifying a compensatory increase in the charge for the performance of it.

The right claimed by the plaintiff in error was defeated by the construction placed by the State Court upon the statute and would have been sustained by an opposite construction. The case is, therefore, one which involves the construction of a Federal statute within the meaning of Sec. 709 of the Revised Statutes.

Starin vs. New York, 115 U. S., 248.

The only question that remains is: Was the right claimed by the plaintiffs in error "a title, right, privilege or immunity" specially set up and claimed under the Federal statute?

It is immaterial that the precise sections of the statute on which the claim was based were not referred to in the pleadings and that the claim was not made in the language of Sec. 709.

Davis vs. Packard et al., 6 Pet., 41.

The record shows that an act of Congress was applicable to the case upon the facts presented to the Court; that the plaintiff in error based its claim to relief upon a particular construction of a Federal statute, and that the statute was otherwise construed.

Also it must be that the right claimed was a right "under the statute," for certainly at least one party was claiming a right under the statute. But, if the right claimed by the defendant in error to require the plaintiff in error to bear the whole burden of the tax was a right claimed under the statute, the right claimed by the plaintiff in error to exempt itself by contract from the payment of the tax was equally a right claimed under the statute, or a privilege, or immunity claimed thereunder.

The clause of the act requiring a stamp to be placed upon a bill of lading or other evidence of receipt and forwarding issued by an express company is found in Schedule A and is as follows:

"Express and Freight: It shall be the duty of every railroad or steamboat company, carrier, express company or corporation or person whose occupation is to act as such, to issue to the shipper or consignor, or his agent, or person from whom any goods are accepted for transportation, a bill of lading, manifest or other evidence of receipt and forwarding for each shipment received for carriage and transportation, whether in bulk or in boxes, bales, packages, bundles, or not so enclosed or included; and there shall be duly attached and canceled, as is in this act provided, to each of said bills of lading, manifests or other memorandum, and to each duplicate thereof, a stamp of the value of one cent: *Provided*, that but one bill of lading shall be required on bundles or packages of newspapers when enclosed in one general bundle at the time of shipment. Any failure to issue such bill of lading, manifest or other memorandum, as herein provided, shall subject such railroad or steamboat company, carrier, express company or corporation or person to a penalty of fifty dollars for each offense, and no such bill of lading, manifest or other memorandum shall be used in evidence unless it shall be duly stamped as aforesaid."

Section 6 of the act provides:

"SEC. 6. That on and after the first day of July, eighteen hundred and ninety-eight, there shall be levied, collected and paid, for and in respect of the several bonds, debentures or certificates of stock and of indebtedness, and other documents, instruments, matters and things mentioned and described in Schedule A of this act, or for or in respect of the vellum, parchment or paper upon which such instruments, matters or things, or any of them, shall be written or printed by any person or persons, or party who shall

make, sign or issue the same, or for whose use or benefit the same shall be made, signed or issued, the several taxes or sums of money set down in figures against the same, respectively, or otherwise specified or set forth in the said schedule."

The plaintiff in error contended in the State Court that according to the true construction of the foregoing provisions, the carrier is required to pay the tax unless and except when by the contract the shipper is to pay it; and on the other hand, the shipper must pay it unless and except when by the contract the carrier is to pay it.

It is submitted that the assertion of the right of the carrier by contract to exempt himself from the payment of the tax is a right, privilege or immunity within the meaning of Sec. 709 of the Revised Statutes; and that the denial by the State Court of the right of the plaintiff in error to exempt itself by contract from the burden of the tax gives this Court jurisdiction to review its decision.

In *Palmer vs. Hussey*, 119 U. S., 96, the highest Court of New York had granted a motion to perpetually enjoin the collection of a judgment obtained in a Court of the State on the ground of the discharge of the defendant in bankruptcy. This Court denied a motion to dismiss a writ of error to the State Court, holding that the claim set up by the plaintiff below that, by reason of the fraudulent and fiduciary character of his debt, it was exempt from the operation of the discharge in bankruptcy was a claim to an immunity within the meaning of Section 709 of the Revised Statutes.

In *Upshur vs. Briscoe*, 138 U. S., 365, a writ of error to review a similar decision was entertained.

In *Bronson vs. Rodes*, 7 Wall., 229, this Court reviewed on writ of error a decision of the Court of Appeals of New York to the effect that a tender of legal-tender notes was a good tender of payment under a contract providing for payment in gold or silver coin.

In *Parker vs. Davis*, 12 Wall., 457, jurisdiction was

exercised under the 24th section of the Judiciary Act to review a decision of the Supreme Court of Massachusetts holding the legal-tender acts constitutional.

In *Montgomery vs. Hernandez*, 12 Wheat., 129, it was held that the Supreme Court might rightfully exercise appellate jurisdiction to review the decision of a State Court in an action upon a marshal's bond where the Federal statute relating to such bonds provided that the action on them should be brought within six years from the time the action accrued, and the State Court edcided that the cause of action had accrued within six years.

II. The plaintiff in error in the State Court claimed an exemption from liability to be sued therein upon the cause of action set up.

It specially denied in its answer the jurisdiction of the State Court and in its petition for a writ of *certiorari* to the Supreme Court of Michigan again alleged the absence of jurisdiction in the State Court. It appears from the opinion of the State Court that it was specially claimed there that the Federal Courts had exclusive jurisdiction and that this claim was denied.

The claim to exemption from suit in the State Court was the claim of immunity under a Federal statute (to wit, Secs. 629, 711, R. S. U. S.), and the denial of the claim gives this Court jurisdiction to review the decision of the State Court.

Davis vs. Packard et al., 6 Peters, 41.

"It is not necessary that the record should state in terms that an act of Congress was in point of fact drawn in question. It is sufficient if it appears from the record that an act of Congress was applicable to the case and was misconstrued, or the decision in the State Court was against the privilege or exemption specially set up under the statute."

III. This proceeding is a "suit" within the meaning of Sec. 709 of the Revised Statutes which this Court has jurisdiction to review by writ of error.

In Weston vs. City Council, 2 Peters, 449, the Court said of the term "suit" used in Sec. 709 of the Revised Statutes (then Sec. 25 of the Judiciary Act):

"The term is a very comprehensive one, and it is understood to apply to any proceeding in a Court of Justice by which an individual pursues that remedy in a Court of Justice which the law affords him."

In that case an application for a writ of prohibition was reviewed by the Supreme Court on writ of error to a State Court.

In Hartman vs. Greenhow, 102 U. S., 672, this Court held that it had jurisdiction to review on writ of error mandamus proceedings in a State Court against a State Treasurer.

In McPherson vs. Blacker, 146 U. S., 1, the Michigan electors case, this Court again held that an application for a mandamus was a suit which it had jurisdiction to review on writ of error to a State Court.

In Boyd vs. Thayer, 143 U. S., 135, a proceeding in a State Court by *quo warranto* to determine the right to hold the office of Governor was reviewed on writ of error.

In Tinsley vs. Anderson, 171 U. S., 101, an application for a writ of *habeas corpus* was held to be a suit which might be reviewed on writ of error to a State Court.

IV. It is submitted, therefore, that the motion to dismiss the writ of error should be denied.

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